

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AIRGAS USA, LLC

Case 09-CA-152301

and

STEVEN WAYNE ROTTINGHOUSE, JR.

**RESPONDENT'S OPPOSITION TO COUNSEL FOR THE GENERAL  
COUNSEL'S MOTION TO WITHDRAW MOTION FOR DEFAULT  
JUDGEMENT**

**Summary**

Counsel for the General Counsel's ("Region 9") Motion to Withdraw Motion for Default Judgment is defective for three reasons: (1) Region 9 fails to state "the grounds therefor," (2) Region 9 continues to allege that Respondent has defaulted on the settlement agreement in case 09-CA-152301, and (3) the motion would prejudice the Respondent, Airgas USA, LLC, and unduly delay resolution of a live legal controversy.

The Respondent, Airgas USA, LLC, entered into a settlement agreement with Region 9 on August 27, 2015 to resolve case 09-CA-152301. Airgas fully performed the terms of the settlement agreement by posting the remedial notice for 60 consecutive days while refraining from communicating in a manner that detracted from the notice. On October 3, 2018, however, Region 9 simultaneously issued a "Complaint Based on Breach of Affirmative Provision of Settlement Agreement" and

filed a “Motion for Default Judgment” with the National Labor Relations Board (“NLRB” or “Board”). On October 5, 2018, the National Labor Relations Board issued a Notice to Show Cause; Airgas filed its Response to the Notice to Show Cause on October 19, 2018. May Region 9 withdraw its Motion for Default Judgment but not its related Complaint without prejudicing the Respondent and unduly delaying the adjudication of a live legal dispute?

### **Argument**

#### **I. Region 9’s Motion to Withdraw Motion for Default Judgment Is Defective and Prejudicial Because It Fails to State the Grounds for Granting the Requested Relief.**

NLRB Regulations governing motion practice stipulate that motions “must briefly state the order or relief applied for and the ground therefor.”<sup>1</sup> Region 9’s Motion to Withdraw, however, fails to provide a single ground.

The general purpose for requiring a moving party to provide the grounds for relief is to “provide notice to the court and the opposing party.”<sup>2</sup> Filing a motion without providing this notice prejudices the opposing party and deprives the adjudicative body of the ability to properly consider the motion.<sup>3</sup> By failing to either state “the grounds therefor” or withdraw its related Complaint, Region 9 has rendered serious consideration of this motion impossible.

---

<sup>1</sup> 29 CFR §102.24(a).

<sup>2</sup> See *Elustra v. Mineo*, 595 F.3d 699 (7<sup>th</sup> Cir. 2010) (and cases cited therein).

<sup>3</sup> *Id.*

**II. Region 9’s Motion to Withdraw Motion for Default Judgment is Prejudicial and Defective Because Region 9 Continues to Allege Respondent Has Breached the Settlement Agreement.**

On October 3, 2018, Region 9 filed a motion for default judgment in case 09-CA-152301 ostensibly as a result of allegations from a “completely separate” case.<sup>4</sup> On the same day, Region 9 issued a “Complaint Based on Breach of Affirmative Provision of Settlement Agreement” in the same case. Now Region 9 would like the NLRB to allow it to withdraw one but not the other.<sup>5</sup> Such an outcome, if sanctioned by the Board, would indefinitely deprive Respondent of its due process rights since Region 9 could—at least according to Region 9’s apparent reading of the default language—refile a motion for Default Judgment against Airgas at any time in the future without regard for the statutory limitation contained in Section 10(b) of the Act.

Unfortunately for Region 9, a Motion to Withdraw Motion for Default Judgment is not appropriate in this case. A tribunal will generally only grant a Motion to Withdraw Motion for Default Judgment where the litigants no longer dispute whether the opposing party is in default and where the Motion to Withdraw the Motion for Default Judgment is unopposed.<sup>6</sup> Region 9 erred when it decided to

---

<sup>4</sup> The allegations considered in and ultimate disposition of a completely separate case “are not relevant to” the determination of settlement agreement compliance in another case. Long Mechanical, Inc., 358 NLRB No. 98 fn 4 (2012).

<sup>5</sup> Region 9 did not attempt to determine Respondent’s position on this Motion prior to filing.

<sup>6</sup> See *Green v. Bauer*, 2008 WL 4155673 (S.D. Ohio, Sept. 9, 2008) (plaintiff’s Unopposed Motion to Withdraw Motion for Default Judgment granted based on finding that “Defendants, having appeared and timely filed an Answer, are not in default.”); *State Farm Fire and Casualty Insurance Company v. Lowe’s Companies, Inc.*, 2016 WL 8609568 (E.D. North Carolina, Feb., 25, 2016) (granting Unopposed Motion to Withdraw Default Judgment after opposing party presented meritorious defense and moving party moved to withdraw); *U.S. v. Distribuidora Batz CGH, S.A. De C.V.*, 2009 WL 2487971 (S.D. California, Aug. 10, 2009) (granting Motion to Withdraw Motion for Default

move to withdraw its prior motion while continuing to pursue the accompanying Complaint. Such an outcome, if sanctioned by the Board, would indefinitely deprive Respondent of its due process rights since Region 9 could—at least according to Region 9’s apparent reading of the default language—refile a motion for Default Judgment against Airgas at any time in the future without regard for the statutory limitation contained in Section 10(b) of the Act.

### **III. Public Policy and Fundamental Legal Principles Disfavor Allowing Region 9 to Withdraw its Motion for Default Judgment**

By pleading to withdraw its prior motion while simultaneously refraining from withdrawing its Complaint, Region 9 has exposed its true intent: to prosecute Respondent for allegedly breaching the settlement agreement.<sup>7</sup> But if Region 9 truly believes that (1) the settlement agreement in case 09-CA-152301 has not expired either due to full performance or by being supplanted by a subsequent settlement agreement, and (2) that Respondent has breached the settlement agreement, then the default language requires Region 9 to pursue resolution through a motion for default judgment. Allowing Region 9 to withdraw its Motion for Default Judgment now exposes Respondent to double-jeopardy: having to prepare to defend itself at

---

Judgment where motion was unopposed and only after relevant defendants filed motions opposing default judgment motion and moved to set aside clerk’s entry of default).

<sup>7</sup> NLRB case law support entering a default judgment where respondent is found to have failed to perform the terms and provisions of an informal settlement agreement. *See e.g., Long Mechanical, Inc.*, 358 NLRB No. 98 (2012). By bringing its initial Motion for Default Judgment, Region 9 contended that Airgas had somehow failed to perform the terms and provision of the informal settlement agreement. By now attempting to withdraw that contention and yet pursue the same contention once again before an Administrative Law Judge, Region 9 is engaged in a type of forum shopping. Given the fact that this case and this very issue (whether the Respondent is in breach of the informal settlement agreement) will end up before the NLRB under either scenario (either now, in deciding the Motion for Default Judgment, or later, when reviewing exceptions filed by one or both parties to the decision of the Administrative Law Judge), it is hard not to presume the worst when attempting to surmise Region 9’s motivation for filing this motion.

hearing while simultaneously facing the ongoing threat of Region 9 filing a new Motion for Default Judgment.

A Motion to Withdraw Motion for Default Judgment is proper when there is no dispute as to default. In this case, however, Region 9 does not get to resolve the “dispute” simply by requesting to withdraw its motion. The actual dispute or controversy<sup>8</sup> concerns whether Airgas effectively settled the unfair labor practice charge underlying case 09-CA-152301 by posting the remedial notice for the required 60 days, as Airgas contends, or whether inclusion of unmodified default language extends the duration of an informal settlement agreement’s term to “forever” regardless of any subsequent informal settlement agreements that might supplant the first, as Region 9 contends. This live legal issue must be decided either now, through resolution of the Motion for Default Judgment, or later, after Region 9 prosecutes its Complaint and one or both of the parties file exceptions to the Administrative Law Judge’s decision. Public policy strongly favors judicial economy and denial of Region 9’s Motion.

### **Conclusion**

In no small part due to Region 9’s failure to state grounds upon which relief may be granted, the Region’s motivation for filing this motion is hard to discern. Regardless, the result is easy to predict: a judicial determination of a live legal

---

<sup>8</sup> Putting aside the “length of term” issue, the actual controversy here also concerns whether an allegation from a “completely separate” case constitutes a breach of an informal settlement agreement in the case under consideration.

controversy will be unduly delayed and the Respondent will be unfairly prejudiced. Public policy and the legal principles of issue preclusion and double jeopardy disfavor this Motion.

Therefore, for any one of several reasons, the National Labor Relations Board should deny the Region 9's Motion to Withdraw Motion for Default Judgment.

Respectfully submitted this 29<sup>th</sup> day of October, 2018

Airgas USA, LLC

/s/Michael C. Murphy  
Michael C. Murphy  
Airgas, Inc.  
259 N. Radnor-Chester Road  
Suite 100  
Radnor, PA 19087  
(215) 990-4867  
michael.murphy@airgas.com

### **CERTIFICATE OF SERVICE**

I certify that a copy of Respondent's Response to Order to Show Cause was electronically served on all parties in the manner listed below:

Garey E. Lindsay (by E-Filing)  
Regional Director  
National Labor Relations Board, Region 9  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

Steven Wayne Rottinghouse (by Electronic Mail)  
4221 Harding Avenue  
Cincinnati, OH 45211

DATED this 29<sup>th</sup> day of October, 2018

/s/Michael C. Murphy  
Michael C. Murphy  
Airgas, Inc.  
259 N. Radnor-Chester Road  
Suite 100  
Radnor, PA 19087  
(610) 230-3077  
michael.murphy@airgas.com